No. 88-148

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN NATURAL GAS COMPANY,
Petitioner,

v.

JOSEPH F. FRITZ, G. B. "BOOTS" SMITH CORPORATION, CHALLENGER DEEP WELL SERVICES, INC., H. LANIER B. FOOTE and EXXON CORPORATION,
Respondents.

PETITIONER'S REPLY BRIEF

JOHN M. GROWER
(counsel of record)
R. WILSON MONTJOY II
JOHN E. WADE, JR.
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101

WILLIAM A. MAJOR, JR.
JOHN C. GRIFFIN
SOUTHERN NATURAL GAS COMPANY
Post Office Box 2563
Birmingham, Alabama 35202-2563
(205) 325-7410

Counsel for Petitioner

November 16, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. SOUTHERN DOES NOT SEEK DIRECT REVIEW OF THE MERITS OF THE FERC'S DECISION	2
II. THE FERC'S DECISION IS FINAL AND SHOULD NOT HAVE BEEN IGNORED BY THE MISSISSIPPI SUPREME COURT	3
III. SOUTHERN DOES NOT SEEK REVIEW OF EVIDENTIARY FINDINGS BY THE MISSISSIPPI SUPREME COURT	5
IV. FERC CLEARLY HAD JURISDICTION TO DECIDE THE CONTROVERSY	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Bowles v. Seminole Rock & Sand Co., 325 U.S. 401 (1945)	4
Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948)	4
Columbia Gas Transmission Corp., 22 FERC ¶ 63,093 (1982), *aff'd* 26 FERC ¶ 61,034 (1984), *aff'd on rehearing* 26 FERC ¶ 61,334, *on remand*, 28 FERC ¶ 63,005, *settlement approved in* 39 FERC ¶ 61,245 (1987)	4,7,8
Ecee, Inc. v. Federal Power Comm'n, 526 F.2d 1270 (5th Cir.) *cert. denied*, 429 U.S. 867 (1976)	4
Logan v. Davis, 233 U.S. 613 (1914)	4
NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981)	5
Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982)	8
Radio-Television News Directors Ass'n v. United States and *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, *consolidated at* 395 U.S. 367 (1969)	3
Red Lion Broadcasting Co. v. Federal Communications Comm'n, 290 U.S. 916 (1968)	3
Regents of the University System of Georgia v. Carroll, 338 U.S. 586 (1950)	5
Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board, 474 U.S. 409 (1986)	8
United States v. Hammers, 221 U.S. 220 (1911)	4
United States v. Johnston, 268 U.S. 220 (1925)	5
Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199 (5th Cir. 1988)	9

Table of Authorities Continued

	Page
STATUTES:	
5 U.S.C. § 706 (1976)	2
Natural Gas Policy Act, 15 U.S.C. § 3414 (1982)	9
Natural Gas Policy Act, 15 U.S.C. § 3431(c)(2) (1982)	8
18 C.F.R. 270.207 (1979)	2,8,9
MISCELLANEOUS:	
Miss. R. Civ. P. 56(c)	6
United States Supreme Court Rule 17	2,5

INTRODUCTION

In its Petition for Writ of Certiorari, Southern Natural Gas Company ("Southern") presented the following question to this Court:

> In a case involving the legality of a gas purchase contract price under a regulation of the Federal Energy Regulatory Commission ("FERC"), did the Mississippi Supreme Court commit error in failing to defer to and conform its decision to a contrary FERC decision issued in essentially the same case and prior to the Mississippi court's final ruling?

In support, Southern noted a substantial line of cases which require courts construing a regulation promulgated by a federal administrative agency to give "controlling weight" or "great deference" to that agency's interpretation of the same regulation issued in an unrelated proceeding. On what is apparently a question of first impression, Southern suggested that the mandate to follow agency rulings should be even more compelling in essentially the same case, involving the same facts, the same issues and certain of the same parties. Despite having the FERC's ruling in this case prior to disposing of petitions for rehearing, the Mississippi Supreme Court refused to follow, or even to acknowledge, the agency precedent.

In the Brief in Opposition, Respondents (hereinafter referred to generally as "Fritz") have chosen not to respond to Southern's arguments. Rather, Fritz has attempted to recharacterize Southern's petition as seeking direct review of either FERC's decision or of alleged fact finding by the Mississippi Supreme Court. Fritz also contends that FERC was without jurisdiction to interpret its own regulation in this case and that Fritz' appeal of that decision to the Fifth Circuit robs it of the finality necessary to create a conflict meriting review by this Court.

I. SOUTHERN DOES NOT SEEK DIRECT REVIEW OF THE MERITS OF THE FERC'S DECISION.

Fritz first suggests that Southern seeks to have this Court review the FERC's decision that payment by Southern to Fritz under the contract at issue would violate Section 270.207 of FERC regulations. Contrary to Fritz' assumptions, Southern does not seek a direct review of the FERC's decision. Rather, Southern seeks to establish that a federal administrative agency's interpretation of its own regulation has primacy over a state court's ruling on an identical issue in essentially the same case. This Court need not decide the correctness of FERC's decision in order to reverse the Mississippi Supreme Court. It can reverse merely by holding that the court was obliged to follow a FERC ruling governing the same parties, and under the same contract and the same facts.

Southern concedes that the interests of judicial economy may best be served by first permitting the Fifth Circuit to rule on Fritz' appeal of FERC's decision.[1] Consequently, Southern submitted its Motion to Defer on September 15, 1988. If the Fifth Circuit, after granting substantial deference to the FERC's decision finds it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706 (1976), it could reverse the FERC. The conflict which forms a basis of Southern's appeal could then disappear without the expense, time and judicial effort necessary to consider Southern's Petition. However, if the Fifth Circuit affirms the decision of the FERC, then under Rule 17.1(a) an even more compelling reason to grant certiorari would exist.[2]

Fritz' argument, taken to its logical conclusion, is yet another attempt to foreclose any binding decision in this

---

[1] Petitioners' briefs were filed with the Fifth Circuit on November 4, 1988.

[2] Even Fritz acknowledges that such an irreconcilable conflict between a state supreme court and a circuit court of appeals would warrant review by this Court. Brief in Opposition at 9.

case other than one rendered by Fritz' chosen forum—the Mississippi courts. If this Court denies certiorari, then the Mississippi Supreme Court decision will become final. Fritz would undoubtedly argue that it is binding upon the FERC and upon the parties. Of course, it would not bind the FERC nor impair the FERC's jurisdiction over Southern for making an illegal payment. See Petition for Writ of Certiorari at 12, n. 10 and 18-21. The result would be two diametrically opposing, final decisions with Southern caught in the middle. Clearly the more appropriate response for this Court is to either grant certiorari and reverse or defer consideration pending a ruling by the Fifth Circuit. If this Court defers action and the Fifth Circuit affirms the decision of the FERC, then any appeal from that decision can be consolidated with this appeal and all issues relating to this case can be resolved once and for all.[3]

II. THE FERC'S DECISION IS FINAL AND SHOULD NOT HAVE BEEN IGNORED BY THE MISSISSIPPI SUPREME COURT

The Mississippi Supreme Court's failure to conform its decision to that of the FERC has resulted in conflicting decisions involving the same contract, the same facts and certain of the same parties. Fritz does not respond to Southern's arguments relating to the Mississippi court's obligation to defer to FERC's contrary decision, but instead merely suggests that an appealed order is not final and therefore does not constitute a conflict sufficient to support a grant of certiorari.

---

[3] Such was the case in the consolidated cases of *Radio-Television News Directors Ass'n v. United States* and *Red Lion Broadcasting Co. v. Federal Communications Comm'n, consolidated at* 395 U.S. 367 (1969). Therein, the Court elected to defer oral argument in *Red Lion* pending a decision by the Seventh Circuit in *Radio-Television* and consideration of the Petition for Writ of Certiorari from that decision. See *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 290 U.S. 916 (1968).

Contrary to Fritz' unsupported allegations, "a complete resolution of matters before an administrative or judicial tribunal does not want for finality until an appeal is decided; it is final unless and until it is stayed, modified or reversed." *Ecee, Inc. v. Federal Power Comm'n*, 526 F.2d 1270, 1274 (5th Cir.) *cert. denied*, 429 U.S. 867 (1976). To be final, an order must merely "impose an obligation, deny a right or fix some legal relationship as consummation of the administrative process." *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 112 (1948). Further, since the FERC's order is admittedly ripe for review by the Fifth Circuit, this order must necessarily be final.

Fritz goes so far as to treat the FERC's decision as a nonentity, stating: "As yet, no court, other than the Mississippi courts, has passed on the issue; thus, there is no line of decisions with which the Mississippi Supreme Court decision arguably conflicts." Brief in Opposition at 9.[4] Of course, it is precisely because the other decision was made by an agency with expertise in interpreting its own regulation, and not a court, that "controlling weight" must be granted. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 401, 413-14 (1945). Courts are obliged to give appropriate deference to final administrative orders even if entered in an unrelated proceeding and even if the order has never been affirmed on appeal. *See Logan v. Davis*, 233 U.S. 613, 627 (1914); *United States v. Hammers*, 221 U.S. 220, 225 (1911). Since the pendency of an appeal does not rob FERC's order of finality, neither does it excuse the Mississippi courts from deferring to it or this Court from treating it as a conflict which merits review.

---

[4] By making this argument Fritz elects also to ignore the FERC's decision in *Columbia*, Petition for Writ of Certiorari at 6, n. 7, based on its alleged factual differences. However, the FERC held that the distinctions, if any, did not warrant a different result and the contracts were "indistinguishable." Petition for Writ of Certiorari, App. F, at 34a, n. 11 and 36a.

Fritz cites Rule 17 and several cases for the proposition that a conflict between a federal agency and a state supreme court is insufficient to warrant this Court's review. Brief in Opposition at 9. However, Rule 17 and the cited cases merely stand for the proposition that conflicting decisions of a court of appeals and a state supreme court generally *do* warrant review by this Court. Fritz has presented no authority that a conflict between an agency ruling and a state court decision will not merit review. However, should this Court elect to grant Southern's Motion to Defer and should the Fifth Circuit affirm the FERC's decision, then even Fritz must admit that a Rule 17 conflict is present. Furthermore, even in the absence of conflicting decisions, this Court has discretion to review a state court decision involving an important question of federal law, such as the Mississippi courts' failure to defer to a contrary decision of the FERC.[5]

III. SOUTHERN DOES NOT SEEK REVIEW OF EVIDENTIARY FINDINGS BY THE MISSISSIPPI SUPREME COURT

Fritz next contends that Southern's Petition seeks a review of a finding of fact by the Mississippi Supreme Court and suggests the existence of a policy of not granting certiorari "to review cases *involving* factual issues." Brief in Opposition at 10 (emphasis added). In support, Fritz cites *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177, n. 8 (1981) and *United States v. Johnston*, 268 U.S. 220, 227 (1925). These authorities do not support Fritz' assertion that certiorari will be denied for cases "involving" factual issues. Nearly every case this Court reviews involves factual issues to one degree or another. Rather, these cases merely hold

---

[5] See Rule 17.1(c). *Accord, Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 594 (1950) ("since an important question of the relation of federal administrative power to state judicial power was involved, we granted certiorari").

that certiorari will not be granted to review questions regarding the sufficiency of evidence. *Id.* Of course, the issue in this case involves the legal obligation of the Mississippi Supreme Court to defer to a ruling by the FERC in essentially the same case, not a factual question regarding the sufficiency of evidence. Furthermore, since the conflicting orders were entered in two proceedings involving the very same facts, the Mississippi Supreme Court's decision can hardly be the result of differences in the facts of two cases.

In addition to mischaracterizing the question Southern has presented for review, Fritz also errs in representing the Mississippi Supreme Court decision as based extensively, if not primarily, upon fact finding.[6] The relevant ruling by the trial court was a summary judgment. That ruling was affirmed on appeal by the Mississippi Supreme Court. Therefore, both Mississippi courts determined that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c).

Even Fritz has stated that the Section 270.207 issue does not involve detailed fact finding. In response to Southern's Motion to Stay on the ground of primary jurisdiction before the trial court, Fritz stated:

---

[6] For example, Fritz contends that the substantive issue in this case "subsumes" five questions of fact relating to such issues as the intentions of the parties. Likewise, Fritz suggests that "twenty-three volumes of record were devoted to deciding the factual issue by the courts below" and details a number of "facts" assertedly found below. Brief in Opposition at 1-4, 5-6 and 8-9.

Southern does not admit the accuracy of Fritz' representations. The Mississippi Supreme Court opinion neither addressed the factual issues nor found the facts suggested by Fritz. *Compare* Brief in Opposition at 1-4, 5-6 and 8 *with* Petition for Writ of Certiorari, App. A. at 2a-4a and 7a-8a. Thus Fritz' representations regarding consideration and issues of intent, among others, are without support below.

> The primary jurisdiction doctrine has no application to cases such as the one at bar, however, where the facts are not essentially in dispute, and a pure question of law is involved.

Plaintiff's Brief in Opposition to Motion to Stay at 34. It is curious that Fritz, having vigorously argued against referral of this issue to the FERC on the ground that *no* factual questions were involved, would now argue against appellate review of this decision on the ground that *only* questions of fact are involved.

Just as Fritz overstates the factual determinations made by the Mississippi courts, he understates the factual record upon which the FERC decided this case. Both Southern and Fritz filed pleadings which each contained their own version of the facts. Indeed, each party had the opportunity to file everything that the party deemed relevant to the FERC's decision. Furthermore, all the relevant Mississippi court decisions were filed with and considered by the FERC. While it is true that the FERC did not conduct an evidentiary hearing, no party ever requested a hearing.

Southern does not suggest that there are no factual disputes in this case. However, since both the Mississippi Supreme Court and the FERC decided the case on a relatively few undisputed facts,[7] they necessarily determined that the remaining factual issues were irrelevant. Therefore, there is simply no basis for Fritz to suggest that this appeal involves the sufficiency of evidence, questions of intent or any other disputed factual findings. Both Mississippi courts and the FERC decided what the relevant

---

[7] See Petition for Writ of Certiorari at 22-23 and App. A at 4a. FERC relied on only three undisputed facts, each of which was also found by the Mississippi Supreme Court. The Mississippi Supreme Court also relied on a few other facts to distinguish this case from *Columbia*. However, as noted above, the FERC rejected these factors as compelling a different result. See note 4, *supra*.

factual issues were, determined that the relevant facts were undisputed, and attempted to apply the law to those facts.

IV. FERC CLEARLY HAD JURISDICTION TO DECIDE THE CONTROVERSY.

Fritz' Brief in Opposition makes two statements concerning jurisdiction. First, Fritz contends that the state court had jurisdiction to decide the Section 270.207 issue. Southern has never contended otherwise. In every primary jurisdiction case both the court and administrative agency have jurisdiction. The question is simply which forum is the more appropriate to render a decision. Despite the Mississippi courts' refusal to stay, the FERC did decide the issue while the case was still pending before the Mississippi Supreme Court. As a result, the case should have been handled just as if the Mississippi courts had granted a stay—the FERC decision, once obtained, should have been given controlling weight.

Fritz' second argument appears to suggest under *Pennzoil Co. v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), that the FERC has no jurisdiction to decide this case or to interpret the contract between the parties. However, *Pennzoil* merely holds that, to the extent FERC is without jurisdiction over certain categories of gas, it is likewise without jurisdiction to interpret contracts that relate to those categories of gas. *Id.*[8] *Pennzoil* also recognizes that if a violation of the Natural Gas Policy Act is involved, then the FERC does have

---

[8] The FERC is not, however, wholly without jurisdiction over "deregulated" gas. FERC retains jurisdiction to deny passthrough of deregulated gas prices if it determines the price "was excessive due to fraud, abuse or similar grounds." 15 U.S.C. § 3431(c)(2) (1982). In *Columbia*, the FERC exercised jurisdiction over deregulated gas in an identical transaction. 26 FERC ¶ 61,034, 61,095-96 (1984). In *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 423 n. 5 (1986), the Court, in a preemption context, examined the

jurisdiction to prohibit sales and to interpret and apply contracts as necessary. *Id.* at 381.

When a Section 270.207 violation occurs, a higher price is payable for deregulated gas as a result of the commitment of regulated gas at the maximum lawful price. Thus part of the deregulated price is actually an illegal price applicable to regulated gas. Consequently, it is FERC's maximum lawful price jurisdiction over regulated gas that is involved in this case, not FERC's jurisdiction over deregulated gas. Under Section 504 of the NGPA, 15 U.S.C. § 3414, the FERC has unquestioned jurisdiction to prohibit such illegal sales and to interpret and apply contracts as necessary to determine whether such a violation has occurred. *See Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 203 (5th Cir. 1988). The FERC itself reached this same conclusion in its Order Denying Rehearing. *See* Petition for Writ of Certiorari, App. G at 41a-42a. To hold otherwise would render the FERC powerless to enforce Section 270.207 because a violation thereof necessarily involves a sale of deregulated gas.[9]

CONCLUSION

The principle of state court deference to a federal agency's interpretation of its own regulation is important. It

---

dangers associated with state decisions which might foreclose regulatory inquiry at the point of passthrough.

[9] Fritz is likewise incorrect in using jurisdiction as an excuse to say that his "only recourse to collect the contract price was to file suit in state court." Brief in Opposition at 6. The record establishes that, prior to suit, Southern voluntarily offered to escrow the disputed funds, with payment to Fritz upon his obtaining a FERC ruling that the payment was lawful. Fritz chose to decline this option, later explaining to the Mississippi Supreme Court at oral argument that he did not feel he could obtain a "fair" decision from the FERC. Having obtained a favorable ruling from his chosen forum, Fritz has fought tooth and nail against any FERC decision. Now that FERC has decided the issue, Fritz has argued against deference thereto by the Mississippi Supreme Court and against this Court's review of the Mississippi court's refusal to abide by FERC precedent.

is even more important in this case of first impression because the court failed to defer to an agency ruling issued in essentially the same case. To fail to review and reverse the Mississippi Supreme Court's ruling would simply invite others to attempt to thwart the jurisdiction of federal administrative agencies and the uniform application of federal regulations.

Respectfully submitted,

JOHN M. GROWER
(counsel of record)
R. WILSON MONTJOY II
JOHN E. WADE, JR.
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101

WILLIAM A. MAJOR, JR.
JOHN C. GRIFFIN
SOUTHERN NATURAL GAS COMPANY
Post Office Box 2563
Birmingham, Alabama 35202-2563
(205) 325-7410

Counsel for Petitioner

November , 1988